
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C 20001-8002

Date:April 6, 1993

Case No.: 88-ERA-19

In the Matter of:

W. ALLAN YOUNG,
Complainant

v.

CBI SERVICES, INC.,
Respondent

Before: John M. Vittone
Deputy Chief Judge

RECOMMENDED ORDER OF DISMISSAL

On February 17, 1993, the undersigned issued an order vacating the continuance earlier granted by Administrative Law Judge Lawrence Levin, and directing the parties to show cause why the Secretary's findings in Case Number 88-ERA-8 should not be given res judicata effect in Case Number 88-ERA-l9. Judge Levin had continued this case pending resolution of Case Number 88-ERA-8, which involved the Respondent's termination of the Complainant's employment. The instant case involves the Respondent's refusal to rehire the Complainant. The Secretary rendered a Final Decision and Order in Case Number 88-ERA-8 in the Respondent's favor on December 8, 1982. Young v. CBI Services, Inc., 88-ERA-8 (Sec'y Dec. 8, 1992).

Instead of briefing the res judicata issue, the Complainant's attorney submitted a Notice of Voluntary Dismissal, postmarked March 15, 1993. Although stating that the Complainant did not believe that justice had been served in Case Number 88-ERA-8, the attorney informed that the Complainant no longer wishes to pursue the complaint in Case Number 88-ERA-l9, and seeks voluntary dismissal. The Notice did not indicate under what legal authority the voluntary dismissal was sought.

A complainant is entitled to a unilateral, unconditional dismissal without prejudice of his or her employee protection complaint under the Energy Reorganization Act, 42 U.S.C. § 5851, in accordance with Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure where the respondent has not filed the functional equivalent of either an answer to the

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complaint or a motion for summary judgment. Mosbaugh v. Georgia Power Co., 90-ERA-58 (Sec'y Sept. 23, 1992) (Rule 41 governs voluntary dismissal of ERA whistleblower complaints because neither the ERA, the implementing regulations at 29 C.F.R. Part 24, or the rules of practice and procedure at 29 C.F.R. Part 18 contain provisions governing voluntary dismissals).

In this proceeding, the Respondent has not, to date, filed a motion for summary judgment. Whether the voluntary dismissal should be without leave of the court, therefore, depends on whether the Respondent has filed the functional equivalent of an answer, or whether this matter has reached such an advanced stage of litigation to preclude voluntary dismissal without leave of the court. Mosbaugh, supra. See also Cable v. Arizona Public Service Co., 90-ERA-15 (Sec'y Nov. 13, 1992) (indicating that the "advanced stage of litigation" exception to Rule 41(a)(1)(i) is disfavored).

The Secretary has held that the regulations implementing the employee protection provision of the Energy Reorganization Act, located at 29 C.F.R. Part 24, do not require an answer to a complainant's telegram requesting a hearing. English v. General Electric Co., 85-ERA-2 (Sec'y Feb. 13, 1992). Merely because a litigant is not required to file an answer, however, does not resolve the question of whether what it has filed constitutes the "functional equivalent of an answer for purposes of determining whether to apply Rule 41(a)(1)(i). It does not appear that the Secretary has issued an opinion describing what constitutes the "functional equivalent of an answer."

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 C.F.R. § 18.5(d)(2) describe the contents of an answer to a complaint where one is required, as follows:

> (2) *Complaints.* Any respondent contesting any material fact alleged in a complaint, or contending that the amount of a proposed penalty or award is excessive or inappropriate or contending that he or she is entitled to judgment as a matter of law, shall file an answer in writing. An answer shall include:
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> (i) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed admitted;
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> (ii) A statement of the facts supporting each affirmative defense.

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An answer, therefore, consists of (1) admissions or denials of allegations contained in the complaint, and (2) a statement of the facts supporting any affirmative defenses. The regulation does not require that these elements be pleaded in detail.

In the instant matter the Respondent has submitted three documents. The first, dated October 10, 1989, was in support of a postponement of the instant case until the Secretary ruled in Case Number 88-ERA-8. The Respondent noted that the parties had already fully briefed the Secretary in the earlier case, and averred that its defense was based on the name facts in both cases.

The second submission was dated October 31, 1989. In this submission the Respondent stated that it "does not deny in either [Case Number 88-ERA-8 or 88-ERA-19] having knowledge of Complainant's protected activities and its defense to both cases is based on the same facts and evidence. Indeed, the only significant difference between the cases is the date on which the alleged discrimination occurred." The Respondent then described the facts as it viewed them, and stated that there are no material and relevant issues in this case not already adjudicated in [88-ERA-8]."

The third submission was dated November 7, 1988. It involved a response to the Complainant's allegations about an inadequate adjudication of facts before Judge Murrett in Case Number 88-ERA-8, and other factual matters.

Regardless of whether these documents were formally characterized as answers, they undoubtedly contained the core information normally required in an answer in a proceeding before a Department of Labor administrative law judge. Specifically, they contain admissions and denials, and set forth the facts pertaining to the Respondent's defense. Accordingly, I find that, although a formal answer is not required in an employee protection administrative adjudication under 29 C.F.R. Part 24, where documents filed by the Respondent nevertheless contain the elements of an answer as set out in 29 C.F.R. § 18.5(d)(2), the Respondent has filed "the functional equivalent of an answer" for purposes of determining whether a voluntary dismissal should be without order of the court pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.

Since the Respondent has filed the functional equivalent of an answer, the Complainant's voluntary dismissal is governed by Rule 41(a)(2) of the Federal Rules of Civil Procedure, which provides that the "action shall not be dismissed at the [complainant's] instance save upon order of the court and upon such terms and conditions as the court deems proper." Mosbaugh, supra. The considerations

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relevant to determining whether a dismissal under Rule 41(a)(2) were discussed by the Secretary in Nolder v. Raymond Kaiser Engineers, Inc., 84-ERA-5 (Sec'y June 28, 1985) and Stokes v. Pacific Gas & Electric Co., 84-ERA-6 (Sec'y July 26, 1988).

Three determinations are required when considering a request for voluntary dismissal under Rule 41(a)(2): (1) whether to allow dismissal; (2) whether the dismissal should be with or without prejudice; and (3) if dismissal without prejudice is allowed, whether any terms and conditions should be imposed. Nolder, supra, slip op. at 8-9 (although ALJ misinterpreted part of Spencer v. Moore Business Forms, 87 F.R.D. 118 (1980), he correctly identified that court's description of the three part determination). In considering a Rule 41(a)(2) motion to dismiss, the adjudicator should be cognizant that the very purpose of Rule 41(a)(2) is to allow dismissal without prejudice. Dismissal with prejudice is a very severe sanction because it bars a plaintiff from ever prosecuting another action based on the same cause, either in federal or state court. Nolder, supra, slip op. at 11-12.

In making the first determination of whether to permit dismissal, it must be considered whether the respondent will be legally prejudiced. "Legal prejudice does not result simply when [a respondent] faces the prospect of a second lawsuit or when [the complainant] merely gains some tactical advantage." Nolder, supra, slip op. at 10, quoting, Hamilton v. Firestone Tire & Rubber Co., Inc., 679 F.2d 143, 145 (9th Cir. 1982). Mere delay does not constitute legal prejudice. Id., slip op. at 14. Moreover, prejudice which could be rectified by attaching conditions to allowing the complainant to withdraw without prejudice does not constitute "legal" harm for purposes of determining whether to permit the withdrawal. Id., slip op. at 13.

Legal prejudice, however, may be found on counts on which the court had already granted summary judgment for the respondent, or where dismissal would allow the complainant to proceed in other courts under different laws that would be more beneficial to the complainant than the laws applicable to the proceedings in which the motion to dismiss was brought.

In the instant proceeding, there have been no motions or rulings on motions for summary judgment. Furthermore, although it is possible that a state claim for retaliatory refusal to rehire would be more beneficial to the complainant than a section 5851 complaint as, for example, where the state permits assessment of punitive damages, this record does not indicate that the Respondent would be detrimentally affected by

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allowing the Complainant to proceed in other forums.[1]

Accordingly, I conclude that there is no evidence of "legal" prejudice to the Respondent, and therefore, recommend to the Secretary that the Complainant's motion to dismiss be allowed.

The second determination in consideration of the Rule 41(a)(2) motion is whether the dismissal should be with or without prejudice. As noted above, Rule 41(a)(2) is premised on permitting a withdrawal without prejudice, and dismissing with prejudice is a severe sanction with res judicata implications. Since the Respondent has not presented argument requesting that the dismissal be with prejudice, and finding no obvious reason to depart from the starting position that a dismissal under Rule 41(a)(2) is normally without prejudice, I recommend to the Secretary that the dismissal be without prejudice.

The final determination to be made is whether conditions should be imposed on the dismissal without prejudice. It is within the ALJ's discretion to recommend the conditioning of dismissal of the complaint without prejudice on reimbursing the Respondent for expenses incurred in the proceeding. Nolder, supra, slip op. at 17. Additional conditions may be imposed (such as conditioning the dismissal on the complainant's agreement that all discovery in the instant case can be used freely in any alternative forums), but generally, a complainant seeking a voluntary withdrawal will be required to reimburse the respondent only for costs and fees that would not be useful in any anticipated litigation. See Brown v. Holmes & Narver, 90-ERA-26 (Sec'y Aug. 31, 1992); Stokes, supra, slip op. at 3; Nolder, supra, slip op. at 17.

In this instance, the Respondent has not proffered any argument in favor of imposing conditions. My review of the record leads me to conclude that the case did not involve much discovery, if any, and that the same arguments regarding res judicata or collateral estoppel could be used by the Respondent in any future proceeding. Further, the Complainant would be time barred from bringing a new cause of action based on the same facts under section 5851 even though granted a dismissal without prejudice. Holder, supra, slip op. at 12 n.ll. Accordingly, I recommend that the Secretary impose no conditions on the dismissal without prejudice.

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RECOMMENDED ORDER

IT IS RECOMMENDED that the Secretary of Labor DISMISS Case Number 88-ERA-l9 without prejudice.

At Washington, D.C.
Entered:
by:

John M. Vittone
Deputy Chief Judge

JMV/trs

NOTICE: This Recommended Order will be served on the parties and the Secretary of Labor. The Administrative File will be forwarded simultaneously to the Office of

Administrative Appeals, which has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions under the Energy Reorganization Act, 42 U.S.C. § 5851. See 55 Fed. Reg. 13250 (1990).

[ENDNOTES]

[1]Pursuant to 29 C.F.R. § 18.6(b), a litigant in a proceeding before the Office of Administrative Law Judges is afforded ten days after a motion is served to file an answer to that motion. In addition, when a pleading is served by mail, five days are added to the prescribed period for taking responsive action, § 18.4(c)(3), and another five days are added for filing a document where the filing is made by mail, § 18.4(c)(1). Accordingly, the Respondent had twenty days, beginning the day following the mailing of the motion to dismiss to respond to motion, and since the final day of the period fell on a weekend, the due date was the next business day. § 18.4(a). Since the Respondent has not responded in this time frame, the motion to dismiss is considered on the evidence and arguments contained in the existing administrative file. Because the regulations already provide a full opportunity for filing a response to any motion filed in an administrative adjudication, it was not necessary for me to issue a Order to Show Cause why the dismissal should not be without prejudice or without conditions prior to ruling on the Complainant's motion to dismiss.